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No. 92-1625

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, and
UNITED MINE WORKERS OF AMERICA, DISTRICT 28,
Petitioners,

v.

JOHN L. BAGWELL, CLINCHFIELD COAL CO.,
and SEA "B" MINING CO.,
Respondents.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF FOR RESPONDENT JOHN L. BAGWELL

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QUESTIONS PRESENTED

I. Whether contempt fines are civil where a court has assessed the fines in accordance with a prospective fine schedule designed to coerce a contumacious party's compliance with the affirmative and prohibitory terms of a court injunction, and where the recalcitrant party could have avoided the fines simply by future compliance with the court order.

II. Whether state courts may determine as a matter of state law that settlement of litigation does not automatically moot previously entered coercive and conditional civil contempt fines, and, if so, whether such a determination renders the fines criminal in nature.

III. Whether contempt fines assessed in accordance with a prospective fine schedule imposing a specific amount for each *future* violation of an injunction contravene the Due Process Clause of the Fourteenth Amendment, where the contemnor can avoid additional fines at any time merely by complying with the court's lawful injunction, and whether petitioners have waived an Eighth Amendment argument that the fines in this case were excessive.

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STATEMENT OF THE CASE

The contempt sanctions at issue in this case arose out of the 1989 strike by the International Union, United Mine Workers of America, and the United Mine Workers of America, District 28 (collectively "UMW" or "the Union") against coal companies in southwestern Virginia. The courts below found that, in the course of that strike, the Union and its members engaged in violent illegal acts on a massive scale. The trial court entered an injunction in an effort to quell the violence, but the Union repeatedly disobeyed the court order. The trial court then announced a prospective schedule of civil contempt fines—conditional on noncompliance—to coerce the Union to comply with the injunction. The Union nonetheless en-

gaged in "repeated, massive, violent violations" of the court's orders. Pet. App. 47a. The question is whether the trial court properly exercised its civil contempt power when it enforced the previously announced sanctions.

On April 12, 1989, the coal companies filed a verified complaint seeking to enjoin the Union, its members, and sympathizers from engaging in specified unlawful activities. The trial court held an evidentiary hearing and found that the Union was engaging in violent, intimidating, and damaging acts. An injunction was issued mandating that the Union conduct its strike lawfully and directing the Union to take affirmative actions to accomplish that end. *Id.* at 118a-121a. On April 29, 1989, the trial court amended and strengthened its injunction, finding that, notwithstanding the initial injunction, "serious incidents of mass picketing, roving picketing, violence, threats, intimidation, and property destruction have continued * * *." *Id.* at 113a.

The Union did not comply with the court's order, and its wholesale violation of the injunction continued. The trial court therefore ordered the Union to show cause why it should not be held in contempt. After the first contempt hearing, the trial court found 72 separate violations of its injunction. *Id.* at 109a. The court imposed $642,000 in fines, $424,000 of which were suspended. *Id.* at 4a n.2, 109a-111a. The court later vacated all of these initial fines on the ground that they were punitive and hence "criminal in nature," because the Union was not given the opportunity to avoid them once they were specified. *Id.* at 4a n.2.

The trial court then established a prospective fine schedule designed to coerce the Union to conduct its strike lawfully in compliance with the court's order. *Id.* at 111a. When it established the prospective fine schedule, the trial court made clear that it was attempting to coerce the Union into future compliance with its orders, and that the Union could avoid paying any fines merely by complying with the court's injunction:

> [T]he union and its members are responsible for how much money * * * is going to be paid, not this Court, not the company, not anyone else. If you go out and violate the law, you are taking that action of your own free will and * * * you will pay the consequences, because it is your act. [*Id.* at 13a-14a (quoting trial court).]

Notwithstanding the prospective fine schedule, the Union continued to violate the injunction. Petitioners' statement of the case, Pet. Br. 2-7, does not remotely convey the extent or seriousness of the violence that gripped Russell and Dickenson Counties as a result of the Union's activities, or the challenge that the orchestrated violence presented to the ability of the circuit court to maintain the rule of law.

The record demonstrates that the Union engaged in mass picketing and blocking of ingress to and egress from coal company facilities, in violation of the court's injunction. *See, e.g.*, J.A. 65-66, 70-71, 125. The Union also coordinated creeping convoys hundreds of cars long to delay coal traffic on highways. *See, e.g.*, J.A. 100, 123-124, 129-132. Union members intimidated workers through threats of violence, engaged in countless acts of rock throwing, and threw and placed "jackrocks,"[1] creating what the State Police described as a "constant hazard" on public roads. J.A. 74; *see, e.g., id.* at 79-80, 85-87, 127, 136-140, 149, 181-184.

As the Virginia Supreme Court noted, the Union's violation of the trial court's orders "increased in frequency and became more violent" as the strike progressed, Pet. App. 14a, to the point that the trial court described the strike as "characterized by violence and terrorism" on

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[1] "Jackrocks" are two nails welded together in the shape of a "v", so that a sharp point is always aimed upward, and are used as a tire puncturing device. Pet. App. 5a. The Union's use of jackrocks was so extensive that the police measured the amount recovered daily in pounds, not numbers. J.A. 128.

the part of Union members. *Id.* (quoting trial court). Hundreds of attacks on vehicles and their passengers are chronicled in the record, ranging from reports of smashed windshields and flattened tires, *see, e.g.,* J.A. 111-114, to instances of cars being run off the road, *id.* at 110-111, shot through, *see, e.g., id.* at 184-185, 193-194, and smashed by strikers, *see, e.g., id.* at 97, 184. Coal truck drivers, company personnel, and their families were subjected to attack. Individuals were threatened and attacked by strikers because their spouses were coal company employees. *See, e.g., id.* at 110-111, 134-135. Workers were pulled off the road, threatened, and assaulted by strikers. *See, e.g., id.* at 174-177, 190, 198-204. Strikers doused the face of a company guard with acid while hurling racial invectives at him. *Id.* at 191-192.

Union leaders coordinated strike activities, *see, e.g., id.* at 65-67, participated in illegal acts in violation of the court's orders, *see, e.g., id.* at 65-67, 71, 124, 141, 156, 194-196, and publicly announced their disdain for the court's orders. *See, e.g., id.* at 152, 172.

Petitioners suggest that the Union should not have been held responsible for the repeated violations of the injunction, *see* Pet. Br. 4 & n.1, but that issue is not before this Court. As the Virginia Supreme Court noted: "Signifi-

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[2] To cite just one example, the acts of Union leaders in storming a coal processing plant for a three-day occupation, J.A. 167-173, rebuffing police requests to leave, *id.* at 168, and congratulating the strikers on their effective performance in the plant seizure, *id.*, provided clear evidence to the trial court that high-ranking union officials were the driving force behind the wave of lawlessness. At one point during the take-over, UMW Vice President Roberts told the strikers that their conduct "only constitute[d] a misdemeanor," *id.* at 170, and boasted that the trial judge would not put Roberts in jail for his actions because the judge did not have "guts enough." *Id.* at 173.

cantly, the Union has not challenged the sufficiency of th[e] evidence in these appeals." Pet. App. 4a. The reason petitioners raised no such challenge is clear. As the trial court concluded, the evidence "proves without question that the International United Mine Workers of America was the author of these actions." *Id.* at 40a, J.A. 29. The court concluded:

> There has been an organized, coordinated effort by the UMWA International and District 28 to put into effect mass violations of law and acts of violence. Not only by individual members, but there has been proof positive beyond a shadow of a doubt that the International leaders have been personally involved with these acts of violence. [*Id.* at 57.]

The federal district court dealing with the same strike at issue here reached the same conclusion. *Clark* v. *International Union, UMWA*, 752 F. Supp. 1291, 1297 (W.D. Va. 1990).

In trying to stop the Union's lawlessness, the trial court was forced to issue no fewer than eight separate contempt orders against the Union. Prior to the entry of each contempt order, the Union was served with a show cause order outlining specifically the alleged contumacious conduct. *See, e.g.*, J.A. 157-163. Discovery was permitted and utilized. The Union was represented by counsel, and lengthy hearings were held with respect to each contempt order. The Union presented evidence and cross-examined opposing witnesses. The court heard myriad witnesses, reviewed hundreds of exhibits, and considered oral argument. The record of the proceedings is literally thousands of pages long. "[O]ut of an abundance of caution and trying to be fair to the defendants," the court required the allegations of particular contemptuous acts to be proved beyond a reasonable doubt. Pet. App. 93a. *See id.* at 55a, 61a, 64a, 71a, 77a, 83a, 85a, 86a, 97a, 102a. Significantly, the trial court rejected hundreds of allegations of contempt of its orders, carefully reviewing the

evidence under the heightened standard of proof before finding petitioners in contempt. *See, e.g., id.* at 67a.

The court imposed two types of fines. Civil compensatory fines were assessed, payable to the plaintiffs, based on the harm caused to the coal companies. Those fines were vacated and are not at issue here. The court also assessed civil coercive fines, in accordance with its prospective fine schedule, payable to the Commonwealth of Virginia and two affected counties. The trial judge repeatedly made clear that the purpose of these fines was to compel compliance, and that the Union could avoid the prospective fines by complying with the injunction:

> The Court is convinced, as [it has] stated numerous times, that this is a civil contempt proceeding. The only way that any fines or any penalties can be assessed is for the defendants to fail to comply with the Court's injunctive orders and the laws of the Commonwealth of Virginia as [they] are stated or * * * outlined in the order. This is not punitive. It is compulsory. It is designed to compel compliance and therefore it is not criminal in nature but civil. [J.A. 166.]

In determining the level of fines needed to coerce compliance with its orders, the court had before it evidence that the UMW had net assets of $170 million, including a strike fund containing some $100 million. Va. S. Ct. No. 91-0634 J.A. at 565-566, 625. As the Union refused to comply with court orders, the fines accumulated under the prospective fine schedule. Over the course of seven additional contempt hearings following the establishment of the fine schedule, the trial court found over 400 violations of its injunction, most of them violent. In total, the Union chose to accumulate over $64 million in fines.

After months of violence, the Union and the coal companies settled their labor dispute, and the strike ended. The Union, in the meantime, had not paid any of the fines. J.A. 59. As part of the settlement, the parties moved the trial court to vacate all the fines. The trial

court, after consideration, agreed to vacate the approximately $12 million in compensatory civil fines that were payable to the companies for damage and harm caused to them by violations of the injunction. Pet. App. 48a.

The trial court refused, however, to vacate the remaining $52 million in coercive civil fines that had been assessed in accordance with the prospective fine schedule. In refusing to vacate these fines, the trial judge emphasized yet again that the purpose of these prospective fines had been to try to compel compliance with the court's orders:

> The Court early on announced its purpose in imposing prospective civil fines * * *. That purpose was to compel compliance with the Court's orders which were entered to protect the rights of the plaintiffs and the public. The fines were conditional and it was within the defendants' sole power to avoid payment of the fines. [*Id.* at 40a-41a.]

The court concluded that its orders "are not bargaining chips" that the parties may negotiate away. J.A. 60.

After the trial court appointed Special Commissioner John L. Bagwell to collect the outstanding fines, Pet. App. 51a-52a, the Union appealed the contempt orders and fines to the Virginia Court of Appeals. The UMW argued that the remaining fines were criminal, not civil, and were impermissibly imposed without all of the constitutional protections attending criminal proceedings. The Union also argued that the settlement rendered the fines moot.

The Court of Appeals "assume[d], without deciding," that the fines were civil, imposed by the trial court "to coerce compliance with its orders," and concluded that in light of the "magnitude of the violations * * * fines of considerable magnitude were reasonably required to coerce compliance from the Union." *Id.* at 30a-32a. The court ruled, however, that the settlement rendered the fines moot. It found the decision in *Clark* v. *Interna-*

tional Union, UMWA, supra, to be "eloquent" in explaining why settlement does *not* necessarily moot civil contempt fines, but the Virginia Court of Appeals concluded that the question was a matter of state law, and that binding state precedent required it to hold to the contrary. *Id.* at 34a-37a.

Before the Virginia Supreme Court, the Union contended that three questions were presented: (1) whether the settlement rendered the contempt fines moot, (2) whether the contempt fines were in fact criminal and accordingly rendered in violation of constitutional protections applicable in criminal contempt proceedings, and (3) whether the fines were so large as to violate due process and federal labor policy. The Union did not mention the Eighth Amendment in its Questions Presented. *See* J.A. 205-206.

The Virginia Supreme Court reversed, concluding that the fines imposed in accordance with the prospective fine schedule were civil, not criminal. The court found that the trial court established the fine schedule and imposed the fines to "coerce the Union into compliance with the court's injunction." Pet. App. 13a. The court also found that the Union "controlled its own fate," and under the fine schedule had the power to avoid any of the specified fines merely by complying with the trial court's injunction. *Id.* at 14a-15a.

The Virginia Supreme Court rejected the Union's argument that the fines were criminal merely because they were imposed for violation of an injunction that prohibited the doing of an act, rather than for violation of an injunction that affirmatively required the performance of an act. In rejecting this argument, the court found that the coercive nature of the fines, as well as the Union's ability to avoid them, did not in any way depend on the prohibitory or mandatory nature of the underlying injunction.

The Virginia Supreme Court also rejected the Union's argument that the settlement required the trial court to

vacate all of the civil fines. The Virginia Supreme Court "agree[d] with the Court of Appeals that 'whether civil contempt sanctions are mooted by subsequent settlements by the private parties to the litigation is a matter of state law,' " and held as a matter of state law that the fines in question were not moot. *Id.* at 16a.

The court also found, in light of the financial strength of the UMW, the gravity of the harm caused by the UMW's wrongdoing, and the UMW's "utter defiance of the rule of law," that the civil coercive fines were not excessive and did not constitute an abuse of discretion. *Id.* at 18a-19a.

SUMMARY OF ARGUMENT

I. The distinction between civil and criminal contempt turns on whether the sanction is coercive and conditional or punitive and determinate. In this case the trial court, confronted with repeated violations of its lawful injunction, announced a schedule of prospective fines—conditional on further violations by the Union—to coerce the Union to comply with the injunction. When the Union nonetheless persisted in violating the court's orders, the court imposed the forewarned sanctions. That imposition—necessary to give effect to the court's effort to compel compliance—did not transform the coercive, conditional fines into criminal contempt.

Contrary to the Union's contention, the proper characterization of a contempt sanction turns on the substance of the proceeding and the character of the *sanction*—not on the phrasing of the underlying *injunction*. Whether the underlying injunction is labeled "mandatory" or "prohibitory" is not determinative; this Court, state courts, and the lower federal courts regularly uphold civil contempt sanctions for violations of prohibitory orders. There are many areas in which this Court distinguishes between remedial, civil sanctions and punitive, criminal ones, but in none of those areas does the Court look to whether the provision violated is mandatory or prohibi-

tory. One reason that petitioners' test has not been accepted as determinative is that it cannot be meaningfully applied: any mandatory order can be rephrased as a prohibitory one, and vice versa; injunctions (like this one) often contain both prohibitory and mandatory terms; and a prohibition in the context of an ongoing dispute of the sort at issue here necessarily requires affirmative steps by the party bound by the injunction to alter the offending conduct.

II. The settlement of the strike and litigation by the Union and the coal companies did not require the Virginia courts to vacate the coercive fines previously entered. Whether a settlement moots the fines is a question a state law, and the Virginia Supreme Court has provided the definitive answer to that question. Nor does the conclusion that the fines are not mooted somehow transform them from civil to criminal contempt. A ruling that the need to maintain judicial authority and respect for the law counsels in favor of enforcing coercive, conditional civil fines after settlement does not mean that the fines were not coercive and conditional in the first place.

Acceptance of the UMW's mootness argument would severely undermine the authority of courts to issue prospective, coercive civil fines to enforce compliance with lawful orders. If the Court agrees with the Union that a contumacious party has the power through settlement to strip the court of its discretion to vacate or enforce the fines, parties in future disputes will be able to disregard the authority of the court with impunity, knowing that any coercive fines assessed can be safely ignored. Such a precedent would eviscerate the very purpose of civil contempt proceedings, leave the court powerless to restrain impending lawlessness, and hold the court hostage to the negotiations of the parties.

III. The fines imposed in this case fully comported with constitutional safeguards. First, the Union has waived its Eighth Amendment argument. The Virginia

Supreme Court did not rule on any Eighth Amendment argument for the simple reason that petitioners failed properly to present one. The argument is therefore not properly before this Court. 28 U.S.C. § 1257.

The fines do not violate substantive due process. The final amount is large only because the Union—conspicuously forewarned—nonetheless chose to commit hundreds and hundreds of acts of contempt. As the trial court noted when it first announced the prospective fine schedule, the Union—not the court—was responsible for the amount of fines ultimately assessed. Given the magnitude and seriousness of the Union's contumacious conduct, the resources available to the Union, and the limited options available to the court to secure compliance with its lawful injunction, the schedule of coercive conditional fines satisfied this Court's standards. Nor can the Union object to the procedures employed in assessing the fines. The Union received detailed notice of the alleged violations prior to each contempt hearing, was represented by counsel, utilized discovery, presented evidence, examined and cross-examined witnesses, and was only found in contempt when the allegations were proved beyond a reasonable doubt.

ARGUMENT

I. THE CHARACTERIZATION OF A CONTEMPT FINE AS CIVIL OR CRIMINAL DOES NOT TURN UPON WHETHER THE COURT ORDER SOUGHT TO BE ENFORCED IS MANDATORY OR PROHIBITORY BUT UPON THE CHARACTER OF THE SANCTION.

The proper classification of the contempt sanctions in this case as civil or criminal is a question of federal law. As this Court has pointed out, however,

> [w]hen a State's proceedings are involved, state law provides strong guidance about whether or not the State is exercising its authority "in a nonpunitive, noncriminal manner," and one who challenges the State's classification of the relief imposed as "civil" or "criminal" may be required to show "the clearest proof" that it is not correct as a matter of federal law. [*Hicks* v. *Feiock*, 485 U.S. 624, 631 (1988) (quoting *Allen* v. *Illinois*, 478 U.S. 364, 368-369 (1986)).[3]]

This case involves proceedings in Virginia courts under Virginia law, and the Virginia Supreme Court unanimously determined that the fines at issue here were imposed in a nonpunitive, noncriminal manner for civil contempt. Pet. App. 14a. Petitioners fail to establish by "the clearest proof" that this classification is incorrect as a matter of federal law. On the contrary, it is clear that the classification by the Virginia courts of the relief they provided was correct.

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[3] This presumption parallels the presumption in favor of Congress' classification of a statute as civil or criminal. *See United States* v. *Ward*, 448 U.S. 242, 248-249 (1980) ("[w]here Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. In regard to this latter inquiry, we have noted that 'only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground' ") (citation omitted).

A. The Fines Were For Civil Contempt Because They Were Coercive And Conditional.

In determining whether contempt is civil or criminal, "the critical features are the substance of the proceeding and the character of the relief that the proceeding will afford." *Hicks*, 485 U.S. at 631. When a court seeks to impose a determinate and unconditional penalty upon a contumacious party, the proceeding and any resulting fine are criminal. When the court establishes a prospective, conditional fine schedule to compel compliance and gives the party the opportunity to avoid any fines simply by future compliance with the court's order, the proceedings and any subsequent fines are civil. In the former situation, the court "is punishing yesterday's contemptuous conduct"; in the latter situation, "it is announcing the consequences of tomorrow's contumacious conduct." *Penfield Co.* v. *SEC*, 330 U.S. 585, 594 (1947). In the former case, the punishment is announced after the contempt and looks solely to the past. In the latter, the sanction is announced prior to the contempt and looks to the future, becoming effective only when the condition of noncompliance is met.

This Court's cases confirm the centrality of this distinction. In *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911), the Court explained that the difference between civil and criminal contempt lies "not [in] the fact of punishment, but rather [in the] character and purpose" of the contempt sanction. The Court noted that a contempt sanction is generally considered civil when designed either to remedy harm caused to the other party by the contempt, or to coerce the recalcitrant party into future compliance with court orders. By contrast, criminal contempt is more exclusively "punitive," and operates "not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience." *Id.* at 441-443. The Court reiterated this key distinction in *United States* v. *United Mine Workers*, 330 U.S. 258,

303-304 (1947), characterizing criminal contempt as "employed * * * to coerce the defendant into compliance with the court's order, * * * to make the defendant comply."

More recently, in *Hicks,* this Court explained that where the contempt penalty imposed is "determinate and unconditional," it is "solely and exclusively punitive," and hence generally criminal in nature. 485 U.S. at 632-633. On the other hand, where the contempt penalty is "conditional," in the sense that the contemnor "has it in his power to avoid any penalty," the character of the contempt is coercive, and hence civil in nature. *Id.* at 633 (citations omitted).

The Virginia Supreme Court faithfully applied the teachings of this Court in analyzing the fines. It ruled that fines imposed by the trial court after the first contempt hearing were properly vacated because, under the principles set forth above, they were criminal in nature. These fines were "determinate and unconditional," based on the Union's numerous injunction violations *before* the trial court set a prospective schedule of fines for future violations. Pet. App. 13a. Because the fines were not conditional and the Union had no opportunity to avoid them once they were announced, the Virginia Supreme Court correctly concluded that they were criminal.

The remainder of the fines at issue here were of an entirely different sort, assessed for violation of the prospective fine schedule established by the trial court after the first contempt hearing. As the Virginia Supreme Court noted, it was "abundantly clear from the record" that the schedule was established "in an effort to coerce the Union into complying with the court's injunction." *Id.* at 14a. The court also noted that these coercive fines were entirely conditional, because the prospective fine schedule gave the Union "the power to avoid imposition of [the] fines" merely by complying with the court's outstanding orders. *Id.* Petitioners at all times had the "keys of

their prison in their own pockets." *Penfield Co.* v. *SEC,* 330 U.S. at 590. Indeed, as Justice O'Connor has put it, they "carrie[d] something even better," because they could avoid sanctions altogether by complying with the order and not triggering the condition on the conditional fines. *Hicks,* 485 U.S. at 650 (O'Connor, J., dissenting).

Petitioners err in viewing the proceedings as of the time the party bound by the order has violated it and had sanctions imposed on him. As petitioners see it, at that point the contemnor is being punished for past conduct and can do nothing to avoid the punishment, so the contempt is criminal. The proper perspective, however, looks to the time the order is entered. At that point the party has the choice of complying with the order or violating it, and is faced with the announced, conditional sanctions intended to compel him to obey the court order. He can avoid the contempt sanctions completely by compliance. The proceedings are therefore civil, and they are not retroactively transformed into criminal proceedings if the party chooses not to comply with the order but instead to violate it, and accordingly incurs the forewarned sanctions.

An order that specifies that a party will be fined $500 a day for every day child support goes unpaid looks to the future, and is intended to secure compliance. If after five days the child support is not paid and the court assesses a $2,500 fine, that fine is not criminal punishment for past behavior but simply liquidation of the court's announced sanctions to compel future behavior. It is of course true that, on day five, the party can no longer avoid the $2,500 fine, just as here the petitioners could not avoid the conditional contempt fines once the condition was satisfied and the fines were assessed against them for failure to comply with the circuit court order. But that does not transform the civil contempt into criminal contempt, or retroactively change the character of the relief from coercive to punitive.

The point is made clear by considering a classic case of coercive civil contempt: jailing a witness until he produces subpoenaed documents. *See Penfield Co.* v. *SEC*, 330 U.S. 585 (1947). If the witness refuses to comply for three days, he will be jailed for three days, not as punishment for his violation of the order, but to give effect to the conditional sanction announced by the court to coerce compliance. The fact that the three days have been served and can no longer be avoided does not render the sentence any less conditional and coercive. So too here when the Union elected to violate the court order in the face of the previously announced sanctions, it triggered the conditional fines. Just like the three days served by the witness, those fines do not lose their character as conditional and coercive after they have been incurred.

Numerous courts have reached the same conclusion:

> [I]nevitably, wherever a compliance fine is assessed and an opportunity given to purge, the failure to purge will bring about a due date. * * * The occurrence of the due date does not transform civil proceedings, whose sole aim is to secure compliance, into a criminal proceeding. Were it otherwise, compliance with laws or orders could never be brought about by fines in civil contempt proceedings. Always the final order requiring payment will follow the act or omission which constitutes the failure to purge. [*Hoffman* v. *Beer Drivers & Salesmen's Union Local 888*, 536 F.2d 1268, 1273 (9th Cir. 1976).]

See also NLRB v. *Blevins Popcorn Co.*, 659 F.2d 1173, 1185 (D.C. Cir. 1981) (to hold that imposition of previously announced fines for violation of court order is criminal contempt "would be to hold that a court may never bring about compliance with its orders by imposing prospective penalties in civil proceedings"); *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook Railroad Co.*, 380 F.2d 570, 578-579 (D.C. Cir.), *cert. denied*, 389 U.S. 327 (1967).

The Second Circuit made the same point in *New York State National Organization for Women* v. *Terry*, 886 F.2d 1339, 1351 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990). The court explained there that conditional coercive sanctions did not lose their civil character when the defendants chose noncompliance, simply because "[t]he factual determination of noncompliance—the assessment of whether the standards showing contempt were satisfied—and the resulting imposition of fines necessarily occurred after defendants' ample opportunity to comply had come and gone." The Ninth Circuit agreed in *Aradia Women's Health Center* v. *Operation Rescue*, 929 F.2d 530, 533 (9th Cir. 1991), concluding that "[t]he fact that a hearing was held subsequent to the violation does not turn an otherwise civil contempt citation into a criminal one."

Petitioners are quite wrong to contend that the situation of a party bound by an injunction and facing coercive, conditional fines is indistinguishable from that of any member of the general public who must comply with the criminal law. *See* Pet. Br. 24. The party bound by an injunction has, through its prior conduct, demonstrated that the entry of injunctive relief against it is justified in the first place. For example, when it entered the amended injunction in this case, the circuit court found that "serious incidents of mass picketing, roving picketing, violence, threats, intimidation, and property destruction" were taking place as a result of the strike; that these illegal acts "are being committed by members of the International and District 28 and the locals in question, or those acting for them;" and that "[t]he acts described will continue if not enjoined." Pet. App. 113a-114a. *Prior* to announcement of the fine schedule at issue in this case, the circuit found—after a hearing—"72 separate violations of the injunction * * * attributable to said defendants * * *." *Id.* at 109a. The Union was plainly not in the situation of "any member of the general public," Pet. Br. 24, when the prospective fine schedule was announced.

It is in any event difficult to discern the point of this argument. Congress can, of course, provide criminal and civil penalties for the same conduct. The civil penalties are not invalid as criminal punishment simply because the same conduct may be prosecuted criminally. *See United States* v. *Ward*, 448 U.S. at 250. So too here the fact that conduct that violates a court order and thereby triggers civil conditional fines designed to coerce compliance with the order may also violate the criminal law does not render the coercive civil fines criminal.

B. The Fact That The Underlying Injunction Was Phrased In Part In Prohibitory Terms Does Not Render The Coercive Conditional Fines Criminal Contempt.

Contrary to the foregoing analysis, petitioners discern in this Court's precedents a mechanical rule that fines imposed for violation of a prohibitory order are necessarily criminal, while those imposed for violation of a mandatory order are civil. Petitioners look not to "an examination of the character of the relief itself," *Hicks*, 485 U.S. at 636, but rather to the phrasing of the underlying injunction.

The Union relies primarily on language from this Court's decision in *Gompers*, but the contention that *Gompers* established a talismanic mandatory/prohibitory test finds no support in *Gompers* itself. The Court in *Gompers* was more constrained, noting only that the distinction "generally" affords "*a* test" for determining the character of the punishment. 221 U.S. at 443 (emphasis added). This Court was plainly not establishing a mechanical formula that overrode the basic distinction between punishment for past acts and conditional sanctions designed to coerce a party's future conduct. *Gompers* involved simple violation of an injunction; the punishment imposed was not a previously announced sanction designed to secure compliance, which the defendant could avoid completely by compliance. *See id.* at

420-422 n.1. The probative value of the distinction drawn in *Gompers* evaporates if the sanction was announced as a *conditional* matter *prior* to the violation to compel compliance. That situation was not considered in *Gompers*.

Petitioners also rely heavily on this Court's statement in *Hicks* that "a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order." 485 U.S. at 632. We agree. But nothing in *Hicks* suggests that performance of an *affirmative* act was a limitation on those situations in which fines payable to the court are civil because they can be avoided by the party subject to the order. *Hicks* happened to involve an order phrased in terms requiring an affirmative act (though it just as easily could have been phrased in terms prohibiting conduct), so it was natural for the Court to refer to such a means of compliance in making the point that the key feature distinguishing civil from criminal contempt is the ability to avoid the fine by compliance with the order.

This Court's decision in *United Mine Workers* confirms that the affirmative or prohibitory label is not determinative in classifying contempt as civil or criminal. The order at issue in that case was plainly phrased in prohibitory terms: the defendants were "restrained * * * from permitting to continue in effect" a notice calling a strike, "from issuing or otherwise giving publicity to" any such notice, "from breaching any of their obligations" under an agreement, "from coercing, instigating, inducing, or encouraging the mine workers [to strike]," and so on. 330 U.S. at 266 n.12. Yet the Court recognized that this prohibitory order could support civil contempt fines. *See id.* at 303 ("The trial court also properly found the defendants guilty of civil contempt"). Of the $3.5 million in fines assessed by the district court, this Court upheld $700,000 as punishment for criminal contempt, and then announced that it would impose the

other $2.8 million unless the union, within five days, complied with the temporary restraining order. *Id.* at 305. This Court did not regard the prohibitory nature of the order as somehow restricting its power to announce a coercive civil sanction that would be imposed for violation of the order.[4]

Judge Learned Hand read *United Mine Workers* as imposing prospective civil coercive fines for violation of a prohibitory order. In *Sunbeam Corp.* v. *Golden Rule Appliance Co.*, 252 F.2d 467 (2d Cir. 1958), the Second Circuit considered a district court order entered after violation of a consent decree prohibiting Golden Rule from selling Sunbeam products below list price. Among other things, the order specified that Golden Rule must pay a fine of $2,500 for every future violation. Speaking through Judge Hand, the court upheld this provision, "rely[ing] upon" this Court's opinion in *United Mine Workers.* 252 F.2d at 472. The injunction at issue in *Sunbeam* was prohibitory—it "forbade Golden Rule from advertising or selling any price-fixed Sunbeam product below list price." *Id.* at 468. That is also how Judge Hand construed the injunction in *United Mine Workers*, as one in which "future conduct [was] *forbidden*," and he saw "no relevant difference between ceasing to strike * * * and ceasing to sell goods * * *." *Id.* at 472 (emphasis added).

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[4] The Union contends that the defendants in *United Mine Workers* "were *not* subject to a broad prohibitory order." Pet. Br. 19-20 n.7 (emphasis in original). A simple reading of the district court order, set forth in this Court's opinion, confirms beyond doubt that it is prohibitory. *See* 330 U.S. at 266 n.12. After specifying that the union must "compl[y] with the temporary restraining order," this Court did go on to explain what was required to constitute full compliance with the prohibitory order: withdrawing the notice terminating the agreement and notifying union members of the withdrawal. *Id.* at 305. The fact that such a plainly prohibitory order can be rephrased to impose mandatory obligations simply demonstrates the manipulability of the mandatory/prohibitory distinction, discussed more fully below. *See infra* at 25-28.

Since *United Mine Workers*, this Court has upheld sanctions imposed for violation of a prohibitory order as valid exercises of the coercive civil contempt power. In *Sheet Metal Workers* v. *EEOC*, 478 U.S. 421 (1986), for example, the district court had entered a prohibitory injunction "enjoining petitioners from discriminating against nonwhites, and enjoining the specific practices the court had found to be discriminatory." *Id.* at 431. When this order was violated, the district court imposed fines on the contemnors, which this Court found "were clearly designed to coerce compliance with the court's orders, rather than to punish petitioners for their contemptuous conduct." *Id.* at 444. Nowhere did this Court adopt petitioners' view that sanctions imposed for violation of a prohibitory order must be characterized as criminal contempt.

In *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949), this Court upheld civil remedies imposed on a company under an injunction prohibiting it from continuing to violate the wage and hour laws. When the company failed to comply with the prohibitory injunction, the Wage and Hour Administrator brought a civil contempt action, and the trial court imposed financial sanctions payable to affected, non-party employees. This Court approved the sanctions as civil relief:

> We are dealing here with the power of a court to grant the relief that is necessary to effect compliance with its decree. The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief. [*Id.* at 193.]

In short, there is no merit to the Union's contention that this Court's precedents forbid the use of civil fines to coerce a party to stop violating prohibitory injunctions.

Nor is the Union correct to suggest that the Virginia Supreme Court has radically departed from the mainstream of American jurisprudence in its analysis of the Union's contempt. No "new test" or "alternate approach"

(Pet. Br. 9, 21) was devised by the court. Indeed, in their petition for a writ of certiorari, petitioners effectively conceded that the Virginia Supreme Court's holding is in accord with the view of the overwhelming majority of courts that have considered whether coercive fines imposed under a prospective fine schedule are civil under the reasoning of *Gompers* and *Hicks*. *See* Pet. for Cert. 7.

For example, in a line of cases involving the efforts of "Operation Rescue" to block access to abortion clinics, three United States Courts of Appeals have recently held that fines assessed according to a prospective schedule intended to coerce a party from continuing to take action prohibited by an injunction are civil within the meaning of *Gompers* and *Hicks*. Thus, in reviewing the contempt award for each subsequent daily violation of the trial court's prohibitory injunction, the Second Circuit held in *New York State National Organization for Women* v. *Terry*:

> [T]here is no doubt that the sanctions were entirely conditional and coercive. * * * The prospectively fixed penalties were plainly intended to coerce compliance with the court's order and to preserve the parties' then-existing legal rights. * * * Faced * * * with a *choice* between compliance or noncompliance with the district court's order, defendants chose the latter course.
>
> * * * Thus, since the sanctions were imposed to compel obedience to a court order they are civil in nature. [886 F.2d at 1351 (emphasis added).]

Both the Third and the Ninth Circuits have reached the same conclusion. *Roe* v. *Operation Rescue*, 919 F.2d 857 (3d Cir. 1990); *Aradia Women's Health Center* v. *Operation Rescue*, 929 F.2d 530 (9th Cir. 1991); *see also NOW* v. *Operation Rescue*, 816 F. Supp. 729 (D.D.C. 1993).

Similarly, in upholding fines imposed under a prospective schedule against the former air traffic controllers' union for its violation of an injunction against continuing a strike, the United States District Court for the District of Columbia concluded that the argument that such fines were "punitive, rather than coercive, [is] meritless." *United States* v. *PATCO*, 110 LRRM 2858, 2864 (D.D.C. 1982).

Finally, in a case involving the very same UMW strike at issue here, the United States District Court for the Western District of Virginia opined that "fines assessed under a prospective fine schedule issued in an effort to halt prohibited conduct certainly appear to fall within the Supreme Court's definition of civil contempt fines." *Clark* v. *International Union, UMWA*, 752 F. Supp. at 1297 n.7.

Indeed, one of the more common and frequently repeated statements of the civil contempt power expressly encompasses violations of both mandatory and prohibitory injunctions. As the court noted in *Whitfield* v. *Pennington*, 832 F.2d 909, 913 (5th Cir. 1987) (emphasis added), *cert. denied*, 487 U.S. 1205 (1988):

> A party may be held in contempt if he violates a definite and specific court order requiring him to perform *or refrain from performing* a particular act or acts with knowledge of that order. The civil contempt sanction is coercive rather than punitive and is intended to force a recalcitrant party to comply with a command of the court.

See also, e.g., Shuffler v. *Heritage Bank*, 720 F.2d 1141, 1146 (9th Cir. 1983) ("A court has power to adjudge in civil contempt any person who willfully disobeys a specific and definite order requiring him to do *or to refrain from doing* an act") (emphasis added); *Lichenstein* v. *Lichenstein*, 425 F.2d 1111, 1113 (3d Cir. 1970) ("Civil contempt * * * is committed when a person violates an order of court which requires that person in specific and definite language to do *or refrain from doing* an act or series of acts") (emphasis added).

In fact, the courts of appeals have routinely upheld findings of civil contempt resulting from violations of injunctions or other court orders prohibiting specified conduct.[5] In addition, in numerous cases involving the National Labor Relations Board, courts of appeals have found parties in civil contempt for violating prohibitive injunctions and court orders.[6]

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[5] *See, e.g., Hartman* v. *Lyng*, 884 F.2d 1103, 1105-06 & n.2 (8th Cir. 1989) (injunction prohibiting Farmers Home Administration employees from demanding the voluntary conveyance of farm property); *FSLIC* v. *Blain*, 808 F.2d 395, 398-399 (5th Cir. 1987) (injunction prohibiting transfer of property without prior written approval of FSLIC); *Transgo, Inc.* v. *Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1022-23 (9th Cir. 1985) (injunction prohibiting use of terms likely to cause confusion with plaintiff's trademark), *cert. denied*, 474 U.S. 1059 (1986); *Perry* v. *O'Donnell*, 759 F.2d 702, 703-704 (9th Cir. 1985) (order prohibiting transfer of proceeds of a divorce settlement); *Commodity Futures Trading Comm'n* v. *Premex, Inc.*, 655 F.2d 779, 781, 784-785 (7th Cir. 1981) (consent decree and injunction prohibiting acts of fraud or misrepresentation); *Shakman* v. *Democratic Organization of Cook County*, 533 F.2d 344, 346 & nn.2-3, 348-350 (7th Cir.) (injunction prohibiting political organizations and governmental units from coercing government employees to take part in political activity), *cert. denied*, 429 U.S. 858 (1976).

[6] *See, e.g., NLRB* v. *Trailways, Inc.*, 729 F.2d 1013, 1016-17 (5th Cir. 1984) (order prohibiting company from discharging or discriminating against employees based on union activity); *NLRB* v. *Southwire Co.*, 429 F.2d 1050, 1052-53 (5th Cir. 1970) (order prohibiting unlawful discharge of or discrimination against employees), *cert. denied*, 401 U.S. 939 (1971); *NLRB* v. *United Mine Workers of America*, 393 F.2d 265, 266-267 (6th Cir.) (order prohibiting UMW from restraining or coercing employees in the exercise of their rights under the NLRA), *cert. denied*, 393 U.S. 841 (1968); *NLRB* v. *Local 254, Building Service Employees International Union, AFL-CIO*, 376 F.2d 131, 133-134 (1st Cir.) (order prohibiting union from threatening, coercing, or restraining persons engaged in commerce), *cert. denied*, 389 U.S. 856 (1967). *See also NLRB* v. *United Mine Workers of America*, Nos. 80-1680, 82-1998, 84-2307, & 85-1003 (4th Cir. Apr. 24, 1987) (court of appeals finds union in contempt and enters prospective fine schedule on petition of NLRB); *id.* (Apr. 23, 1990) (same; consent contempt adjudication requiring payment from union to NLRB).

The area of contempt is of course not the only area in which this Court is called upon to distinguish between remedial and punitive sanctions. The Court draws the same distinction when, for example, classifying statutes as civil or criminal, *see United States* v. *Ward*, 448 U.S. 242 (1980), determining the applicability of the Double Jeopardy Clause to a particular sanction, *see United States* v. *Halper*, 490 U.S. 435 (1989), and considering whether a statute is a bill of attainder, *see Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U.S. 841 (1984), or an ex post facto law, *see Johannessen* v. *United States*, 225 U.S. 227 (1912). In answering those and similar questions, the Court looks to considerations such as the classification intended by the legislature, *see Ward*, 448 U.S. at 248-249; *Selective Service System*, 468 U.S. at 854-856, and whether the sanctions serve nonpunitive goals. *See id.*; *Halper*, 490 U.S. at 448. In *none* of these areas in which the Court must decide whether a sanction is remedial or punitive—the same question at issue here—does the Court ask whether the underlying provision that was violated is mandatory or prohibitory. Petitioners offer no explanation for why this factor should be *determinative* in the contempt context, when it serves *no* role at all when the Court looks at the same issue in other contexts.

C. The Mandatory/Prohibitory Test Cannot Be Meaningfully Applied.

As the Virginia Supreme Court recognized, petitioners' affirmative/prohibitory test "presents a distinction without a difference." Pet. App. 15a. As a matter of logic, any mandate can be phrased as a prohibition, and vice versa. A prohibition on illegal strike activities is a requirement to comply with the laws and orders making the activities illegal. An order directed against protesters blocking access to a clinic can be styled in mandatory

terms—comply with trespass laws—or prohibitory terms—do not trespass. An order concerning prison population can be phrased affirmatively—lower the population to 400 inmates—or in prohibitory terms—house no more than 400 inmates in the institution.[7]

The complete manipulability of the test proposed by petitioners flies in the face of this Court's admonition that States must be given "intelligible guidance" about how their contempt proceedings will be classified as a matter of federal law. *Hicks*, 485 U.S. at 636. If, as under petitioners' approach, the proper classification of a proceeding turns on, for example, whether it is viewed as mandating steps to stop an illegal strike or prohibiting steps in furtherance of an illegal strike, the States are given no practical guidance whatever. The approach of the Virginia Supreme Court, in contrast—and the approach of every federal court of appeals to have considered the question—affords clear guidance based on whether the order is designed to coerce compliance by specifying sanctions the party bound by the order can avoid by compliance.

The mandatory/prohibitory distinction cannot be determinative because injunction orders often contain both obligations phrased in affirmative terms and obligations phrased in prohibitory terms. *See, e.g., NLRB* v. *Blevins Popcorn Co.*, 659 F.2d at 1175; *Labor Relations Comm'n* v. *Fall River Educators' Ass'n*, 382 Mass. 465, 416 N.E.2d 1340, 1342 n.2 (1981). That is true of the orders at issue in this case. The trial court orders sought

[7] Professor Dobbs has termed the affirmative/prohibitory distinction relied upon by the Union a "deviant" test for determining whether contempt fines are civil or criminal. Dobbs, *Contempt of Court: A Survey*, 56 Cornell L. Rev. 183, 239-240 (1971). As he notes, "[i]n many situations the two kinds of injunctions are different in form, but not in purpose or effect." Dobbs, *Law of Remedies* 224-225 (1993). *See* Note, *Civil and Criminal Contempt of Court*, 46 Yale L.J. 326, 328 (1936) (affirmative-prohibitory test "seems fatally superficial in that it enables the judge to phrase the order either negatively or positively").

not only to force the Union to obey the law, but also directed that the Union leadership take affirmative steps to inform members and sympathizers to do likewise. The injunctive orders affirmatively called upon the UMW to:

- Use all lawful means reasonably available to it to insure compliance with the injunction. That was not done.
- Place a designated supervisor or captain at each picket site to enforce the injunction. That was not done.
- Make available the names of strike supervisors to law enforcement authorities. That was not done.
- Report to the court in writing all violations of the injunction. That was not done. [*See* Pet. App. 115a-116a, 120a.[8]]

Quite apart from these express affirmative directives in the injunction, it is important to recognize that injunctions of the sort at issue here are entered in the course of ongoing lawlessness. It did not occur to the trial court out of the blue to prohibit the Union from placing members at the specifically identified mine entrances "in such a manner as to obstruct the vision of operators of vehicles, entering or exiting, of the roadway for oncoming traffic," or from placing more than ten persons as pickets at identified spots. The court prohibited such acts because the Union was doing just that in the course of the strike. The prohibitions therefore required affirmative acts by the Union to change the course of its conduct. Labeling such an order as prohibitory or affirmative is an exercise with no relation to what this Court has said is "critical" in classifying contempts—an examination of "the substance of the proceeding and the character of

[8] The UMW steadfastly refused to comply with its affirmative obligations. Instead, Union officials openly defied the court's orders, and participated in violations of the injunction. *See supra* at 4-5 & n.2.

the relief that the proceeding will afford." *Hicks*, 485 U.S. at 631.

* * * *

In sum, the Union's exclusive reliance on the affirmative/prohibitory distinction obfuscates the true question: whether the fines were simply after the fact punishment for *past* injunction violations and hence criminal in nature, or conditional efforts to achieve *future* compliance with court orders. The Virginia Supreme Court correctly found the latter to be the case:

> When a court orders a defendant to perform an affirmative act and provides that the defendant shall be fined a fixed amount for each day he refuses to comply, the defendant has control of his destiny. The same is true with respect to the court's orders in the present case. A prospective fine schedule was established solely for the purpose of coercing the Union to refrain from engaging in certain conduct. Consequently, the Union controlled its own fate. [Pet. App. 15a.]

The Union has not carried its burden of showing by "the clearest proof" that the State's classification of these sanctions as civil rather than criminal was incorrect. *Hicks*, 485 U.S. at 631. That classification accordingly should be respected.

II. THE SETTLEMENT OF THE LABOR DISPUTE DID NOT MOOT THE CIVIL COERCIVE CONTEMPT FINES.

A. The Effect Of A Private Settlement On The Collection Of Unpaid Contempt Sanctions Is A Question Of State Law That Has Been Resolved By The Highest Court Of Virginia.

The Virginia Supreme Court plainly grounded its decision on mootness in state law. Pet. App. 16a ("We agree with the Court of Appeals that 'whether civil contempt sanctions are mooted by subsequent settlements by the private parties to the litigation is a matter of state law' ").

Under state law, it held that "the fines in question are not moot." *Id.* at 17a. It reasoned:

> Courts of the Commonwealth must have the authority to enforce their orders by employing coercive, civil sanctions if the dignity of the law and public respect for the judiciary are to be maintained. If we were to adopt the Union's mootness contention, any organization which faced coercive, contempt fines would know that, in order to completely avoid payment of the fines, it only had to postpone actual collection of the fines until the settlement of the underlying litigation. [*Id.*[9]]

Petitioners' extended attack, Pet. Br. 25-37, on the Virginia Supreme Court's holding that settlement of the case did not moot the contempt sanctions rests on an unstated assumption that the mootness question in the state proceeding is necessarily governed by federal law. Petitioners make no effort to ground this assumption in either a federal statute purporting to preempt state court contempt procedures or provisions of the Federal Constitution allegedly mandating this result. Rather, petitioners' entire argument rests on the surprising assertion that the state courts are bound by this Court's announcement of a federal rule of decision in *Gompers*. *Id.* at 25 ("*Gompers* * * * is the governing precedent. * * * *Gompers* requires reversal of the decision below"). There is, however, no basis in federal statutory or constitutional law to require the Virginia Supreme Court to dismiss coercive civil con-

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[9] The Court also noted its view that "our resolution of the issue is consistent with federal decisions." Pet. App. 17a (citing *United States* v. *Criden*, 633 F.2d 346 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) and *United States* v. *Work Wear Corp.*, 602 F.2d 110 (6th Cir. 1979)). These cases are discussed *infra* at 37-38 & n.13. This observation, of course, does not indicate that the court rested its decision on federal law; it used the federal cases "only for the purposes of guidance" and plainly did not believe that the cases "themselves compel the result that the court has reached." *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983).

tempt sanctions whenever the underlying private dispute is settled.

Contrary to the mode of analysis reflected in petitioners' brief, the application of federal rules in state proceedings—like the exercise of federal power generally—is not a default option that governs unless it can be demonstrated otherwise. Rather, this Court has observed on numerous occasions that, even in suits within the jurisdiction of the federal courts, state law governs unless a federal statute or the Constitution mandates a contrary rule, or unless—in rare cases—federal interests require application of federal common law.

The Court's seminal decision in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), "reflects the principle that federal courts should apply state law to legal issues, unless there is some federal interest sufficient to justify the application of independent federal standards." 19 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4515 at 275. Ordinarily, the federal interest sufficient to justify the application of federal law is articulated in the Constitution or federal statutes enacted pursuant to constitutional authority. *Hanna* v. *Plumer*, 380 U.S. 460, 471-472 (1965). Although federal courts may fashion federal common law in certain circumstances where the rights and duties of the United States are at issue, "where 'litigation is purely between private parties and does not touch on the rights and duties of the United States,' federal law does not govern." *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 506 (1988) (quoting *Bank of America Nat. Trust & Sav. Ass'n* v. *Parnell*, 352 U.S. 29, 33 (1956)). *See also* 28 U.S.C. § 1652.

In a related vein, this Court has repeatedly confirmed the independent role of state courts in our federal system. The Court has recognized, for example, that "the allocation of authority in the federal system" empowers state courts to adopt rules at odds with those that would be applied in the federal courts. *ASARCO, Inc.* v. *Kadish*,

490 U.S. 605, 617 (1989). "We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law * * *." *Id.*[10] *See also Los Angeles* v. *Lyons*, 461 U.S. 95, 113 (1983).

The Court has specifically addressed the primacy of state law and state courts in the matter at issue in this case: the contempt power. "That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice." *Michaelson* v. *United States*, 266 U.S. 42, 65 (1924). *See also Young* v. *Vuitton et Fils S.A.*, 481 U.S. 787, 795-796 & n.7 (1987). Unless state law mandates otherwise, the state courts, no less than federal courts, retain the power to sanction contempt as a core function of judicial authority. In *Juidice* v. *Vail*, 430 U.S. 327 (1977), this Court observed that

> The contempt power lies at the core of the administration of a State's judicial system * * *. Whether disobedience of a court-sanctioned subpoena, and the resulting process leading to a finding of contempt of court, is labeled civil, quasi-criminal, or criminal, we think the salient fact is that federal-court interference with the State's contempt process is "an offense to the State's interest * * *." [*Id.* at 335-336 & n.12 (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)).]

These principles compel the conclusion that the Virginia Supreme Court committed no error when it determined that vested civil contempt fines survive settlement by the parties. There is no basis in the Constitution or laws of the United States to require application of a

[10] Among those limitations, of course, is the mootness limitation at issue in this case.

federal rule to resolve that question. A state court's resolution of the issue is squarely within the core power of the state courts to determine the legal boundaries of contempt proceedings within their jurisdiction.

For this reason, all of the cases cited by petitioners in support of their view that the coercive fines are moot are irrelevant. *E.g.*, Pet. Br. 29 n.13. None involves the controlling law of Virginia.

B. Permitting Collection Of Coercive Civil Contempt Fines After Settlement Of The Private Dispute Out Of Which The Fines Arose Does Not Transform Those Fines Into Criminal Contempt Penalties.

Petitioners also make the alternative argument that the state court's failure to hold the fines moot transformed the civil coercive penalties into criminal sanctions. *See, e.g.*, Pet. Br. 28. We have already demonstrated that the coercive fines at issue here were plainly civil because they were imposed pursuant to a conditional and prospective fine schedule. Nothing in the Virginia Supreme Court's decision to permit collection of those fines after settlement of the underlying suit changed the essential character of the civil fines.

The decision of the Virginia Supreme Court was grounded in its understanding that civil contempt orders are not all of the same character. It has long been recognized that "[j]udicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *United States* v. *United Mine Workers*, 330 U.S. at 303-304. *See also McComb* v. *Jacksonville Paper Co.*, 336 U.S. at 191 ("Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court *or* to compensate for losses or damages sustained by reason of noncompliance") (emphasis added).

In examining the mootness question below, the Virginia Supreme Court suggested that the effect of settlement on the continuing vitality of contempt sanctions turns on which type of civil contempt sanction is at issue in any particular case. Thus, the court observed that this Court's federal decision in *Gompers*—although not binding here—was not inconsistent with the rule it announced: "In *Gompers*, unlike in the present case, the only relief sought was compensatory relief to be paid to the complainant company, which had settled its case. *Gompers* did not involve coercive, civil contempt sanctions." Pet. App. 18a.

Although petitioners have repeatedly derided the Virginia Supreme Court's understanding of *Gompers, e.g.*, Pet. Br. 33, it is faithful to the facts of the case. As the *Gompers* Court itself explained, "this was a proceeding in equity for civil contempt where *the only remedial relief possible was a fine payable to the complainant.*" 221 U.S. at 451 (emphasis added). The mootness rule applied in *Gompers* was directly related to the inability of the complainant to secure the relief sought as a result of the settlement: "[W]hen the main cause was terminated by a settlement of all differences between the parties, the complainant did not require and was not entitled to any compensation or relief of any other character." *Id.* at 451-452. The Virginia Supreme Court's understanding of *Gompers*, moreover, is echoed in this Court's decision in *United Mine Workers*, where the Court observed that *"[w]here compensation is intended,"* the complainant's "right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy." 330 U.S. at 304 (emphasis added).

There is, of course, nothing surprising in the rule that a private settlement between the parties in the underlying dispute would moot *compensatory* contempt sanctions; settlements ordinarily constitute a resolution of all disputes between civil litigants. The trial court in this action

observed this rule, agreeing to vacate the $12 million in compensatory civil fines payable to the companies for damages incurred as a result of petitioners' violations of the injunction. *See supra* at 2, 7.

Conversely, there is nothing illegitimate about a rule permitting *coercive* civil contempt sanctions of the type at issue here to survive the settlement of the underlying suit; there is certainly nothing about a state's adoption of such a rule that compels the conclusion that those otherwise civil fines are transmogrified into criminal sanctions. As we have already explained, that basic distinction is determined by reference to the character of the contempt sanction. The determination, moreover, is properly made at the time the prospective sanction is announced; later occurring events over which the court has no control (such as the contemnor's violation or settlement) should not be the basis for finding that the court's announcement of the sanctions, legitimate when made, could not later be enforced.

Apart from their incorrect intimations that the federal rule they describe governs directly, petitioners make very little effort to explain why the Virginia Supreme Court's decision must, as a constitutional matter, transform these coercive civil fines into criminal sanctions. Their primary argument appears to be that the courts below, announcing their decisions to require the collection of liquidated fines, considered the judicial and public interests that would be served by collection. *E.g.*, Pet. Br. 26 & n.12.[11] But vindication of these interests *after* the announcement of valid prospective coercive civil con-

[11] Petitioners also suggest that the trial court's appointment of a special commissioner to pursue collection of the contempt sanctions converted the proceeding into criminal contempt litigation. Pet. Br. 26, 32. But a state court's decision to permit pursuit of the action by a special commissioner as an officer of the court no more makes this a criminal action than pursuit of civil penalties by government officials renders those actions criminal in nature. *See United States* v. *Ward*, 448 U.S. 242 (1980).

tempt sanctions and numerous violations of the underlying order is plainly lawful.

This Court has repeatedly recognized that contempt sanctions—whether civil or criminal—may legitimately serve mixed purposes, and inevitably do. In *Gompers*, the Court observed that "if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience." 221 U.S. at 443.[12] In determining the civil or criminal nature of the sanctions, however, the Court has looked to the character of those sanctions rather than their indirect effect: "[S]uch indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*." 221 U.S. at 443.

We have demonstrated that the sanctions at issue here were conditional and coercive *civil* sanctions announced by the court to secure compliance with its injunction. The court's later decision to vindicate its authority and the public interest by enforcing its lawful orders was nothing more than an indirect effect of the Union's law-

[12] Considering the contempt at issue in *Juidice*, the Court observed that although it "serves * * * to vindicate and preserve the private interests of competing litigants, * * * its purpose is by no means spent upon purely private concerns. It stands in aid of the authority of the judicial system, so that its orders and judgments are not rendered nugatory." 430 U.S. at 336 n.12. Most recently, the Court observed in *Hicks* v. *Feiock*, 485 U.S. at 635, that "[i]n contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order." *See also Hutto* v. *Finney*, 437 U.S. 678, 690-691 (1978).

lessness. The record in this case plainly establishes that the fine schedule was not announced as a means of vindicating the authority of the court. Rather, it was announced to secure compliance with its order. Pet. App. 14a. Petitioners now ask this Court to hold that a consequence of their resistance to these sanctions is that their obligation to pay dissipates upon settlement of the underlying dispute. That rule should be rejected.

To remove from a state court the power to collect coercive civil sanctions after settlement of the underlying dispute, as petitioners urge, would utterly eviscerate the efficacy of civil contempt sanctions. If petitioners' argument governed, any individual or organization facing coercive civil contempt fines would know that it had only to postpone actual collection of the fines until the settlement of the underlying dispute to avoid payment of the fines altogether. As the *Clark* court noted:

> If this court's inherent power of coercion to enforce its orders by civil contempt is inhibited as the Union seeks under the facts of this case, and if the Union can by simple averment that the strike is over avoid the consequences of its disobedience as is sought here, then the Union's tour de force will be complete: it will be above the law in Southwest Virginia. [752 F. Supp. at 1302.]

Indeed, the UMW, having refused to pay its fines when they were first incurred, seeks now to be rewarded for its *total* disregard of court orders. If the UMW had paid its civil contempt sanctions (instead of, as it did, ignoring them), it could hardly argue that its settlement of the underlying strike would somehow transform those paid-up sanctions into illegitimate criminal penalties and thereby automatically entitle it to reimbursement for its payments.

In the particular context of this case, moreover, adoption of the rule petitioners urge would eliminate the historic power of state courts to enter coercive civil contempt fines. Although frequently acrimonious and extended, labor disputes almost always result in settlement. A union

—or an employer—found in civil contempt of court during the pendency of a strike, and threatened with coercive fines to secure compliance with a court's order, would, under petitioners' rule, be under no coercion whatsoever as a result of the fines. Rather, the contemnor would have every incentive to flout the court's orders, and its fines, confident that the matter will eventually be settled and the fines rendered moot by the settlement.

Even in the lower federal courts, which are of course bound by any rule announced in *Gompers* and this Court's cases, it is understood that coercive civil fines do not necessarily evaporate upon the settlement of the underlying proceedings.

In *United States* v. *Work Wear Corp.*, 602 F.2d 110 (6th Cir. 1979), a coercive civil contempt fine had been imposed on an antitrust defendant for failure to divest itself of certain businesses pursuant to a consent decree. The Sixth Circuit affirmed the district court's refusal to grant a joint request to vacate the fine after the divestiture had been completed. The Sixth Circuit rejected the argument that the district court's decision demonstrated the criminal nature of the contempt sanction. Citing the Second Circuit's earlier observation in *United States* v. *Wendy*, 575 F.2d 1025, 1029 n.13 (2d Cir. 1978), that "[t]he civil nature of the contempt is not turned criminal by the court's efforts at vindicating its authority," the court observed that "[t]his is particularly true here, where the contempt sanction imposed was a coercive daily fine, designed to secure compliance with and respect for the court's order." *Work Wear*, 602 F.2d at 115.

Similarly, in *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook Railroad Co.*, 380 F.2d 570 (D.C. Cir.), *cert. denied*, 389 U.S. 327 (1967), the court refused to vacate a coercive civil contempt fine imposed for violation of an anti-strike injunction on the ground that the contempt was mooted by the return of the unions to work. The union argued, as petitioners do here, that the imposition of the earlier-

prescribed conditional and coercive fines after its return to work made the fines punitive and the action criminal in nature. *Id.* at 578. "We cannot agree," the court wrote, "that these proceedings evolved, at any stage, into a criminal contempt action." *Id.* In its decision arising from the same strike that led to this lawsuit, the District Court for the Western District of Virginia relied on these authorities to hold that the fines at issue there were not moot as a result of the settlement of the strike. *Clark, supra.*[13]

Ultimately, however, we of course do not suggest that these federal court decisions bound or permitted the Virginia Supreme Court to adopt the rule it announced below. Rather, its historic power of equity, and its status as an independent and coordinate state court, permitted the Virginia court to determine as a matter of state law that settlement of the underlying labor strike should not result ineluctably in dissipation of liquidated fines for the Union's contempt. That decision did not transform the sanctions into impermissible criminal contempt penalties. It merely enforced the earlier-announced consequence of petitioners' conscious decision to defy the circuit court's efforts to maintain public safety and security in the region.

III. THE CIVIL FINES IMPOSED IN RESPONSE TO THE UMW'S REPEATED ACTS OF CONTEMPT COMPORT WITH THE CONSTITUTION.

A. The UMW Has Waived Its Eighth Amendment Claim By Failing Properly To Present The Issue To The Court Below.

Although the UMW now maintains that the civil contempt fines assessed against it violate the Excessive Fines Clause of the Eighth Amendment, it made no Eighth

[13] *See also United States* v. *Criden*, 633 F.2d 346 (3d Cir. 1980) (even where record in underlying proceeding is closed, question regarding coercive contempt not moot: "We do not perceive the role of the district court in this important case as a hired umpire dragged in from the street to preside over a dispute between private litigants"), *cert. denied*, 449 U.S. 1113 (1981).

Amendment argument before the Virginia Supreme Court. The Union therefore has waived its right to have this Court consider that issue. *See* 28 U.S.C. § 1257.

This Court has long made clear that, when reviewing the judgment of a state's highest court, it will not consider an issue that was not raised or decided below. *See, e.g., Illinois* v. *Gates*, 462 U.S. 213, 218-219 (1983) (summarizing cases); *Crowell* v. *Randell*, 35 U.S. (10 Pet.) 368, 398 (1836). Moreover, the issue must be presented to the state court "in such manner as to bring it to the attention of that court." *Green Bay & Miss. Canal Co.* v. *Patten Paper Co.*, 172 U.S. 58, 68 (1898). Where state procedural rules require that the issue be raised in a particular manner or at a particular time, failure to follow such rules will prevent review of the issue by this Court. *See Webb* v. *Webb*, 451 U.S. 493, 501 (1981); *Beck* v. *Washington*, 369 U.S. 541, 549-554 (1962). Finally, this Court has made clear that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street* v. *New York*, 394 U.S. 576, 582 (1969). *See Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Fuller* v. *Oregon*, 417 U.S. 40, 50 n.11 (1974).

Because the opinion of the Virginia Supreme Court is devoid of any reference to the Excessive Fines Clause or the Eighth Amendment,[14] the UMW must establish that the issue nevertheless was properly presented to that court

[14] Any suggestion by the UMW that the Virginia Supreme Court addressed an Eighth Amendment claim is simply wrong. *Cf.* Pet. Br. 38. The UMW suggests that the state court was discussing this Court's recent Eighth Amendment jurisprudence, when in fact the Virginia court was analyzing the Union's due process claim and the cases relied upon by the UMW in support of its due process argument: *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), and *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989). Pet. App. 18a.

in order to seek review here. The Union cannot satisfy this burden.

The "Questions Presented" by the UMW to the Virginia Supreme Court made no mention of the Eighth Amendment or its Excessive Fines Clause. J.A. 205; Br. for Appellant, at 5 (Va. S. Ct. No. 92-0299); Br. for Appellees, at 7 (Va. S. Ct. No. 91-0634).[15] Indeed, in one brief, the sole reference to the issue was a lone sentence appearing as a footnote within the discussion of the due process issue, where the UMW suggested that "[b]y parity of reasoning, the fines imposed are so unreasonably large as to violate the excessive fines clause of the Eighth Amendment."[16] Br. for Appellant, at 23 n.16 (Va. S. Ct. No. 92-0299). In the Union's other brief, the only references were the same sentence, this time in the text of the due process discussion, and a reference in an argument heading and a conclusory paragraph. Br. for Appellees, at 4, 44-45 (Va. S. Ct. No. 91-0634). The UMW clearly failed to satisfy the requirements of the Virginia Supreme Court regarding the manner in which issues must be presented, for that court has emphasized that it will not wade through lengthy briefs or the record hunting for critical issues. *See, e.g.*, Va. S. Ct. Rule 5:27; *Spencer v. Commonwealth*, 240 Va. 78, 99, 393 S.E.2d 609, 622, *cert. denied*, 498 U.S. 908 (1990); *Nicholas v. Harnsberger*,

[15] The Union filed two sets of briefs because the Virginia Supreme Court had before it two appeals. In one, the Virginia Court of Appeals had ruled on the validity of the first five contempt orders. Va. S. Ct. No. 91-0634. In the other, the appeal pending before the Court of Appeals regarding the remaining three contempt orders was certified to the Virginia Supreme Court. Va. S. Ct. No. 92-0299. *See* Va. Code Ann. § 17-116.06. In the former case the Union was appellee; in the latter it was appellant.

[16] Even if this Court were to find that this sentence was sufficient to preserve the Eighth Amendment issue for review here, the UMW should not be permitted to expand its argument beyond the point suggested by this sentence, which is that the protection afforded by the Eighth Amendment extends no further than the safeguard of due process.

180 Va. 203, 22 S.E.2d 23, 25 (1942). Thus, the reason the Virginia Supreme Court did not mention any Eighth Amendment argument in its decision is the obvious one: no such argument was properly presented to it. Because it failed properly to raise the Eighth Amendment issue before the Virginia Supreme Court, the UMW cannot seek review of that issue here.

Nor is there anything about the UMW's asserted Eighth Amendment claim that warrants relaxation of this Court's strict rule against reaching an issue that was not properly presented to the state court. Indeed, this Court has found a waiver of analogous issues where a litigant has failed to preserve the claim for review. *See Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 76 (1988).

B. The Accumulated Civil Contempt Fines Imposed On The Recalcitrant Union, Which Cover Hundreds Of Violations Occurring Over Many Months, Do Not Violate The Constitution.

The Union maintains that its due process rights were violated because the amount of the fines was not calibrated to the harm caused or the severity of the acts, and because the levies were "grossly excessive." *See* Pet. Br. 37-38, 40. Neither argument withstands scrutiny.

As an initial matter, the UMW's reliance on this Court's recent decisions in *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), and *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), is misplaced. As the Virginia Supreme Court recognized, "[t]hese cases * * * deal with the issue of punitive damages and have nothing to do with coercive, civil fines imposed for contempt of court." Pet. App. 18a.[17] The distinction is crucial, for while punitive damages are designed to punish a wrongdoer for past conduct, civil contempt

[17] The Virginia Supreme Court was specifically referring to *Browning-Ferris* and *Haslip*, the cases upon which the UMW relied before that court. This Court's decision in *TXO* had not yet been announced.

fines primarily serve the remedial function of seeking to secure compliance with the court's order.

The criteria to be employed in assessing the propriety of a civil contempt fine were established not in *Haslip* or *TXO*, but long ago in *United States* v. *United Mine Workers*, 330 U.S. 258 (1947). There the Court upheld both criminal and civil contempt fines against the UMW, as well as criminal fines against its president. The Court explained the different factors to be taken into account in each situation. In the case of criminal contempt, the focus is properly on the past conduct which led to the fine:

> In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge. [*Id.* at 303.]

As discussed below, these factors are strikingly similar to those suggested by this Court in *Haslip* and *TXO* as appropriate for evaluating punitive damage awards. Such a resemblance is not surprising, given that both criminal contempt sanctions and punitive damage awards are designed to punish past conduct.

The analysis is very different, however, in the case of civil contempt. Because the aim is "to coerce the defendant into compliance with the court's order," *id.*, the court must "consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *Id.* at 304. In addition, fines for civil and criminal contempt should both take into account "the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant." *Id.* Applying these criteria, this Court in *United Mine Workers* assessed a prospective $2.8 million fine against the UMW, a fine that would be imposed if the UMW failed to comply with the order at issue in that case within five days after issuance of the mandate. *Id.* at 305. *See supra*, at 19-20.

The very same principles that led to the assessment of a multi-million dollar civil contempt sanction against the UMW nearly five decades ago require that the sanctions imposed by the trial court in this case be upheld. The trial court's day-to-day familiarity with the Union's activities made it aware of the violent character of the Union's conduct and the magnitude of the threat that conduct presented not only to the coal companies and their employees but to the general public as well. *See, e.g.*, Pet. App. 44a. Given that it was dealing with a "financial giant," the court recognized that significant fines were required to attempt to compel the Union to comply with the lawful injunction. J.A. 188. As the Virginia Court of Appeals put it, "[a] review of the facts in the record which reflect the magnitude of the violations involved and the resulting impact on the operations of the Companies, as well as the communities at large persuade us * * * that fines of considerable magnitude were reasonably required to coerce compliance from the Union." Pet. App. 31a-32a.

In rejecting the UMW's attack on the fines, the Virginia Supreme Court was likewise faithful to this Court's holding in *United Mine Workers*. The Virginia court examined each of the factors announced by this Court as relevant to an evaluation of a civil contempt fine. Thus, the court specifically considered "the Union's vast financial resources and the magnitude of the injunction violations," *id.* at 18a, as well as the fact that "the imposition of fines was the only device available to the trial court to coerce the Union into compliance with the court's injunction." *Id.* at 19a. Because the Virginia

Supreme Court properly applied this Court's precedent in upholding the civil contempt fines at issue, there is no basis for overturning those fines now.

The amount of the civil contempt fines imposed in this case represents a proper and lawful exercise of the trial court's discretion. As this Court has emphasized, the very nature of the factors to be analyzed in assessing a fine mandates that "great reliance must be placed upon the discretion of the trial judge." *United Mine Workers*, 330 U.S. at 303. *See In re Grand Jury Subpoena Duces Tecum, 91-02922*, 955 F.2d 670, 673 (11th Cir. 1992). The trial court's decision should not be disturbed absent a showing that this discretion has been abused. Given the UMW's flagrant and repeated violations of the trial court's injunction, the schedule of prospective fines thereafter established by the court certainly was neither unreasonable nor arbitrary. The sanctions imposed by the trial court therefore should remain undisturbed.

Moreover, even if this Court's recent decisions in *Haslip* and *TXO* were found to apply in the context of a civil contempt fine, the analysis mandated by those cases establishes that the fines at issue here comport with due process. In *Haslip*, this Court upheld a large jury award of punitive damages, despite the defendant's assertion that the verdict was "the product of unbridled jury discretion." *Haslip*, 111 S. Ct. at 1037. While the Court recognized that "general concerns of reasonableness and adequate guidance * * * enter into the constitutional calculus," *id.* at 1043, the Court found these concerns satisfied where the jury had been properly instructed and its verdict had been fully reviewed through the appellate process. *Id.* at 1046.

Likewise, in *TXO*, the Court upheld a punitive damages award of $10 million that accompanied a compensatory damages award of only $19,000. 113 S. Ct. at 2717. The Court acknowledged that the Due Process Clause places limits on the amount of punitive damages that can be assessed, and determined that in reviewing such

damage awards, it was appropriate to consider the potential harm caused by the improper conduct, the need to deter similar behavior in the future, general concepts of reasonableness, and the deliberateness of the wrongful conduct. *Id.* at 2721-22.

By the time the trial court in this case first issued its schedule of prospective fines, there had already been more than 70 violations of the court's injunctions issued barely a month before. Pet. App. at 109a. The trial court's subsequent contempt orders imposing fines reflect a cogent understanding of the actual and potential harm presented by the UMW's continued unbridled lawlessness, the deliberateness of the Union's actions, and the need to deter future violations. *See, e.g., id.* at 77a-79a, 92a-94a, 102a-104a. Consequently, to the extent that *TXO* and *Haslip* apply to this case, their requirements were satisfied.[18]

The UMW's suggestion that it was deprived of due process because of the manner in which the fines were assessed is directly refuted by the facts. The Union received show cause orders prior to each hearing which set forth each incident of assertedly contumacious conduct. In addition, the UMW was represented by counsel throughout the hearing process; it was permitted to and did conduct discovery prior to each hearing; and it was able to present evidence and examine witnesses at each hearing. More significantly, the UMW at all times had notice of the specific monetary sanctions it would face

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[18] Indeed, that the UMW was not deprived of due process is even more apparent when the circumstances of this case are contrasted with those in *Haslip* and *TXO*. In each of those cases, the defendants were faced with unexpectedly high punitive damages as a result of their past conduct. Unlike the UMW, those defendants had no opportunity to decide in advance whether to incur specific monetary liabilities by engaging in conduct that was known to carry such financial consequences. Nevertheless, in both *Haslip* and *TXO* this Court found that the punitive damage awards comported with due process. No different result is warranted here.

for each future violation of the trial court's lawful injunction. Indeed, after each contempt hearing, the Union was able to assess its financial liability based on its violations to date. Nevertheless, the UMW and its members chose to continue to display contempt for the trial court in the face of ever-mounting fines by committing additional violations and thereby incurring additional sanctions. It defies common sense to label the result of such a choice a deprivation of due process.

Nor does the aggregate amount of the civil contempt fines imposed against the UMW in the instant case warrant a finding that the fines exceed constitutional bounds. Although the UMW makes much of the fact that it could find no other case imposing fines of this magnitude, see Pet. Br. 37 n.20, the UMW fails to acknowledge that the assessments at issue represent the aggregate fines for over four hundred individual violations of the trial court's injunctions over an eight-month period. When each sanction is considered individually, the Union's argument collapses. The fact that the combined total of the sanctions climbed so high simply reflects the unprecedented level of scorn with which the strikers regarded the injunctions. The court in *Madden* v. *Grain Elevator, Flour & Feed Mill Wkrs.*, 334 F.2d 1014, 1022 (7th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965), might well have been speaking of this case when it declared that the union there had "no right to complain of the results which followed its persistent violations, any more than an overweight individual has just cause for complaint against the scale upon which he stands which informs him of his overweight."

Moreover, the fines imposed against the UMW here are no less reasonable than those which this Court itself imposed against the UMW in 1947. In *United Mine Workers*, this Court determined that a fine of $2.8 million was warranted if the UMW refused to comply with the Court's mandate within five days. 330 U.S. at 305. Translated to 1990 dollars, this fine for a single act of contempt would equal approximately $16.8 million.[19] In comparison, the accumulated fines imposed here for over four hundred acts of contempt can hardly be deemed unconstitutional.

Indeed, the UMW does not and cannot assert that the fines assessed against it were disproportionate to its repeated acts of contempt.[20] Nor can the Union disavow responsibility for the violence with which it conducted the strike of 1989. When the trial court was faced with a "financial giant," J.A. 188, which refused to comply with the rule of law and which used its contumacy for economic leverage, the court resorted to the only effective legal means it could muster to attempt to bring about compliance with its orders.

The findings of contempt and the assessment of the fines at issue comported with the requirements of the Constitution and this Court's precedents.[21] After choos-

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[19] This calculation is based on a comparison between the Consumer Price Index for March 1947, when this Court rendered its decision in *United Mine Workers*, and that for August 1990, when the trial court refused to vacate the civil coercive fines in this case.

[20] Although the Union suggests that the analysis below was procedurally flawed because of the trial court's failure to calibrate the fines to the actual harm caused by the Union's tactics, Pet. Br. at 38, such an analysis is required neither by *United Mine Workers*, nor by *Haslip* and *TXO*. Moreover, the trial court properly observed that because the fines were not civil compensatory fines, there was no need to correlate the amount of the fines directly to the millions of dollars spent by the state in attempting to maintain order, the losses suffered by private citizens, or the millions in compensatory fines made payable to the coal companies. *See* J A. 188.

[21] Even if this Court were to find that the UMW did not waive its claim premised on the Excessive Fines Clause, and assuming that the Clause would apply to the civil contempt fines at issue, there would be no basis for finding that these fines violate the Eighth Amendment. In holding that the fines comported with due process and the dictates of *United Mine Workers*, the Virginia Supreme Court considered the harm threatened by continued con-

ing to treat the court's authority as an object of derision, and the violation of court orders as a badge of honor, the UMW now seeks to escape the ineluctable consequences of its choice. The Virgina Supreme Court properly ruled that the UMW must accept financial responsibility for its actions. That decision is lawful, just, and essential to the ability of the judiciary to coerce compliance with lawful injunctions when the risk of mass disorder threatens the safety and security of the community.

CONCLUSION

For the foregoing reasons, the judgment of the Virginia Supreme Court should be affirmed.

Respectfully submitted,

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tumacy (Pet. App. 18a), the deliberateness of the UMW's violations (*id.* at 19a), the fact that the imposition of fines was the only device available to coerce compliance (*id.*), the large number of violations (*id.*), the financial resources of the contemnor (*id.* at 18a), the coercive (rather than punitive) character of the fines (*id.* at 14a, 19a) and the general appropriateness of the fines under the circumstances of this case (*id.* at 18a-19a, *see also id.* at 31a-32a). The court plainly considered any factors that could be deemed relevant to an Eighth Amendment claim. Thus, even if the Court finds that the Eighth Amendment issue is properly before it and that such an analysis is applicable in this context, the judgment should be affirmed.